Supreme Court, U.S.
FILED
941969 JUN 1 - 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term 1994

STATE OF NEBRASKA,

Petitioner,

v.

JOHN EDWARD RUST,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74pp

QUESTION PRESENTED FOR REVIEW

1. Whether jeopardy attaches in a capital sentencing proceeding when it can be demonstrated that the state has met its only burden of proof under state law.

2. Whether the Double Jeopardy Clause of the federal constitution is implicated in the direct appellate review of a capital sentencing proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES CITED iv

OFFICIAL REPORTS 1

GROUND FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT 6

QUESTION #1: Whether jeopardy attaches in a capital sentencing proceeding when it can be demonstrated that the state has met its only burden of proof under state law 6

I. PROVING vs. WEIGHING: A TWO STEP PROCESS 6

II. THE NEBRASKA CAPITAL SENTENCING PROCESS 9

III. THE PROSECUTION PROVED AND RUST'S SENTENCING PANEL FOUND BEYOND A REASONABLE DOUBT THAT STATUTORY AGGRAVATION WAS PRESENT IN THIS CASE. THAT FACT DISTINGUISHES RUST'S SITUATION FROM THOSE PRESENTED IN BULLINGTON AND RUMSEY 12

A. Arizona v. Rumsey 12

B. Bullington v. Missouri 13

C. Poland v. Arizona 15

TABLE OF CONTENTS – Continued

Page

IV. THE DOUBLE JEOPARDY CLAUSE DOES NOT ATTACH TO THE SOLELY SUBJECTIVE EXERCISE OF A SENTENCING COURT'S DISCRETION. 16

QUESTION 2. Whether the Double Jeopardy Clause of the federal constitution is implicated in the direct appellate review of a capital sentencing proceeding 18

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

CASES

Arizona v. Rumsey, 467 U.S. 203 (1984) ..... *passim*

Bullington v. Missouri, 451 U.S. 430 (1981) ... 13, 14, 17

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 17

Clemons v. Mississippi, 494 U.S. 738 (1990) 7

Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955) 8

Harris v. Alabama, ___ U.S. ___, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995) 7, 8

Poland v. Arizona, 476 U.S. 147 (1986) .. 6, 9, 15, 17, 18

Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993), cert. denied, ___ U.S. ___, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993) 1, 4, 18

Schiro v. Farley, 510 U.S. ___, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994) 18

Sorola v. Texas, 493 U.S. 1005 (1989) 7

State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986) 8

State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977), cert. denied, 434 U.S. 912 reh'g denied, 434 U.S. 988 (1977) 1, 4, 18

State v. Rust, 208 Neb. 320, 303 N.W.2d 490 (1981), cert. denied, 454 U.S. 882 (1981) 1

State v. Rust, 223 Neb. 150, 388 N.W.2d 483 (1986), cert. denied, 481 U.S. 1042 (1987) 1

State v. Rust, 247 Neb. 503 (1995) 1

TABLE OF AUTHORITIES CITED – Continued

Page

Stroud v. United States, 251 U.S. 15 (1919) 17

United States v. DiFrancesco, 449 U.S. 117 (1980) 17

CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257 2

Neb. Rev. Stat. § 28-201 (1964) 8

Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994) 3, 5

Neb. Rev. Stat. § 29-2522 (Reissue 1989)..... *passim*

Neb. Rev. Stat. § 29-2523 .....3, 10

Neb. Rev. Stat. § 29-2529 9

STATUTES AND RULES

Constitution of the United States, Article V 2

OFFICIAL REPORTS

A.

The decision of the Nebraska Supreme Court in question here is reported at *State v. Rust*, 247 Neb. 503 (1995). See Appendix pages 1-19.

The decision of the state trial court is unreported and is duplicated at pages 21-49 of the Appendix.

B.

The underlying judgment of conviction has been the subject of the following reported decisions. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied*, 434 U.S. 912, *reh'g denied*, 434 U.S. 988 (1977) (mandatory direct appeal); *State v. Rust*, 208 Neb. 320, 303 N.W.2d 490 (1981), *cert. denied*, 454 U.S. 882 (1981) (first state postconviction action); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied*, 481 U.S. 1042 (1987) (second state postconviction); *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993) (federal habeas corpus directing re-sentencing).

GROUND FOR JURISDICTION

A.

The opinion of the Nebraska Supreme Court in question here was filed March 3, 1995.

B.

The State of Nebraska's motion for rehearing was filed March 13, 1995 and overruled by the Nebraska Supreme Court on April 12, 1995.

C.

Jurisdiction is conferred upon this court to consider this matter by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

***Constitution of the United States,* Article V.** "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

Neb. Rev. Stat. § 29-2522 (Reissue 1989). "After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525."

Neb. Rev. Stat. § 29-2523 (1989). "The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

* * * *

(f) The offender knowingly created a great risk of death to at least several persons;

* * * *

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws."

Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994). "Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo

contendere, the county attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient."

STATEMENT OF THE CASE

In 1975, John Rust (hereinafter "Rust") and two companions committed the armed robbery of a grocery store in Omaha, Nebraska, which quickly turned into a running gun battle with Omaha Police through a residential neighborhood. In the end, Rust had killed one civilian and wounded two police officers. Rust was convicted of first degree murder and three counts of shooting with intent to kill, wound or maim by the District Court of Douglas County, Nebraska. Rust was sentenced to death for the first degree murder of the civilian, Michael Kellogg, and that conviction and sentence was affirmed on mandatory direct appeal. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied*, 434 U.S. 912, *reh'g denied*, 434 U.S. 988 (1977).

When Rust's case reached federal habeas corpus review, the Nebraska courts were ultimately directed to re-conduct the penalty phase of Rust's first degree murder case. *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).

Rust's re-sentencing was undertaken in 1994 before a three judge panel of the District Court of Douglas County, Nebraska. In its written decision the panel specifically

found that the State of Nebraska had proven beyond a reasonable doubt the existence of two statutory aggravating factors. (App. pp. 32, 38)

Under Nebraska's capital sentencing statutes, if no aggravating circumstances are found to be present, a sentence of life imprisonment must be imposed. Neb. Rev. Stat. § 29-2522 (1989). However, once aggravating circumstances have been proven by the prosecution, then the sentencing panel is required by statute to move next to the subjective, non-factual "weighing" phase of the process of determining whether life or death is the appropriate penalty. *Id.*

The sentencing panel ultimately directed a sentence of life imprisonment for Rust. App. p. 48. The State, believing that the sentencing panel committed an error of law by failing to find the existence of additional aggravating circumstances, appealed that sentence under a Nebraska statute which allows the prosecution to appeal a sentence the prosecution believes to be unduly lenient based upon the facts of the case. Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994).

The Nebraska Supreme Court did not take up the merits of the prosecution's statutory appeal, but instead concluded the State's direct appeal of that sentence violated the Double Jeopardy Clause. See Appendix p. 16.

ARGUMENT

QUESTION 1: Whether jeopardy attaches in a capital sentencing proceeding when it can be demonstrated that the state has met its only burden of proof under state law.

This case presents a set of facts which fall directly between those presented in *Arizona v. Rumsey*, 467 U.S. 203 (1984) and *Poland v. Arizona*, 476 U.S. 147 (1986) and thus presents the question: Is it to the prosecution's failure to meet its burden of proof or to the sentencing entity's "weighing" of such objective proof, once established, that the protections of the Double Jeopardy Clause attach?

We believe the Nebraska Supreme Court's resolution of this question, in the context of a capital sentencing, is contrary to rules of law and analysis contained in prior rulings of this court.

I.

PROVING vs. WEIGHING: A TWO STEP PROCESS

A.

The capital sentencing analysis required under Nebraska and Arizona law are remarkably similar. Each system hinges upon the ability of the prosecution to prove beyond a reasonable doubt the existence of one or more statutory aggravating circumstances. If the prosecution fails to offer sufficient proof of the objective facts required to find a statutory aggravating circumstance, then the sentence must be life imprisonment. § 29-2522.

After the prosecution has met that objective factual threshold, however, the prosecution is neither obligated nor constitutionally capable of offering further evidence. The remainder of the sentencing process, the assignment of relative **weight** to the aggravation found to be present beyond a reasonable doubt, is left solely to the subjective discretion of the judicial officers of the sentencing court. § 29-2522.

This court's decisions have repeatedly noted the constitutionally relevant distinctions between the trial-like process by which the factually objective statutory aggravating factors must be ascertained and the wholly subjective judicial process of "weighing" those factors once proven.

> We have rejected the notion that a "specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding [once found as a matter of fact] is constitutionally required. *Franklin v. Lynaugh*, 487 U.S. 164, 179 . . .

Harris v. Alabama, ___ U.S. ___, 115 S.Ct. 1031, 1035, 130 L.Ed.2d 1004 (1995). See also *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990); *Sorola v. Texas*, 493 U.S. 1005 (1989) (a majority of this court denied certiorari and in so doing rejected an argument that where an error of law has occurred at a sentencing proceeding in which a sentence of life imprisonment was imposed, that re-conducting the penalty phase of that proceeding violated the Double Jeopardy Clause. *Id.*, Brennan, J., dissenting.) It was an

error of law by the sentencing panel which the state was attempting to cure in its direct appeal of Rust's sentence.[1]

In *Harris* this court observed:

> The Alabama statute provides that the weighing process "shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison," [citation omitted] which is not less than the Constitution requires, see *Proffit*, 428 U.S., at 258, 96 S.Ct., at 2969 (joint opinion). . . . [I]n the subjective weighing process, the emphasis given to each decisional criterion must of necessity vary in order to account for the particular circumstances of each case. See *Eddings v. Oklahoma* [citation omitted].

Id., 115 S.Ct. at 1037. To the same effect the Nebraska courts are directed to engage in a subjective – not mathematical – weighing of the aggravating circumstances found to be present in an individual case. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986).

B.

In *Rumsey* the prosecution failed to prove the existence of any statutory aggravating circumstance[2], that required objective evidentiary threshold was not met by

---

[1] The prosecution argued on appeal that the trial court's interpretation of a conviction for "aiding and abetting" (App. p. 36-37) was contrary to established state law and thus denied the state an additional aggravating circumstance. See Neb. Rev. Stat. § 28-201 (1964); *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955).

[2] *Id.* at 205-207.

the prosecution, and this court ultimately concluded the Double Jeopardy Clause prevented the prisoner's re-sentencing. However, in *Poland*, as in Rust, the prosecution did offer proof satisfactory to the sentencing entity that established the existence of at least one of the factually objective statutory aggravating circumstances was present beyond a reasonable doubt,[3] and this court ultimately found that the Double Jeopardy Clause did not prevent that prisoner's re-sentencing. The statutorily required written findings of Rust's sentencing panel establishes that the prosecution met its burden of proof in this case. App. pp. 32, 38.

The distinction between *Poland* and Rust's situation is that Poland ultimately received a sentence of death prior to appeal and Rust did not. However, our analysis of this court's cases on this subject leads us to believe that such a distinction, standing alone, is not legally significant and that Rust's case, like Poland's, was capable of remand and re-sentencing without violation of the Double Jeopardy Clause.

II.

THE NEBRASKA CAPITAL SENTENCING PROCESS

Nebraska's capital sentencing process is generally described by Neb. Rev. Stat. § 29-2529 through 29-2546 (Reissue 1989).

Of particular relevance here are the provisions of Neb. Rev. Stat. § 29-2522 (Reissue 1989) which provides:

---

[3] *Id.* at 157.

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.
>
> If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

The "aggravating circumstances" referred to in § 29-2522 are found in Neb. Rev. Stat. § 29-2523 and, as relevant here, provide:

> The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

* * * *

(f) The offender knowingly created a great risk of death to at least several persons;

* * * *

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

Under Nebraska's sentencing analysis, the State cannot objectively prove that an individual convicted of first degree murder should be sentenced to death. Following the reasoning of *Furman v. Georgia* and the cases which followed it, the Nebraska Legislature placed upon the prosecution only the burden to prove the existence of particular **objective facts** which distinguish this murderer from his fellow first degree murderers who will not be considered for the ultimate criminal penalty. During the penalty phase of a capital sentencing, the prosecution cannot appropriately offer evidence which does not specifically relate to one of the defined statutory aggravating circumstances. For the prosecution's proof to wander beyond those objective bounds would violate the objectivity requirements of both Nebraska's statutory capital sentencing process and the teaching of *Furman*.

However, when and if the prosecution successfully meets that objective factual burden, the question of sentence is not resolved. Instead, the proof of these objective facts is then **subjectively** considered, analyzed or "weighed" by the sentencing court, to ultimately determine the prisoner's sentence. There is no further proof the prosecution can offer to impact that final, subjective judicial process. § 29-2522. We do not believe the Double Jeopardy Clause impacts that subjective aspect of the capital sentencing process.

III.

THE PROSECUTION PROVED AND RUST'S SENTENCING PANEL FOUND BEYOND A REASONABLE DOUBT THAT STATUTORY AGGRAVATION WAS PRESENT IN THIS CASE. THAT FACT DISTINGUISHES RUST'S SITUATION FROM THOSE PRESENTED IN *BULLINGTON* AND *RUMSEY*.

A.

Arizona v. Rumsey

The State of Arizona apparently employs a capital sentencing procedure remarkably similar to that of Nebraska. Sentences are imposed by the court rather than a jury, the trial court is required to make specific findings with respect to the presence of aggravating and mitigating factors, and in the absence of a finding that the state has proven the existence of at least one statutory aggravating factor beyond a reasonable doubt, no sentence of death may be imposed. *Arizona v. Rumsey*, 467 U.S. 203, 205-207 (1984).

As opposed to Rust's situation, in *Rumsey* the state trial court at Rumsey's initial sentencing **specifically found that the prosecution had proven no statutory aggravating factors** beyond a reasonable doubt. Therefore, under Arizona law – as with Nebraska law – no sentence of death was possible for Rumsey due to a failure of proof. That failure of proof with respect to statutory aggravating circumstances prompted the attachment of the Double Jeopardy Clause.

Rust's situation is clearly distinguishable. Rust's sentencing panel specifically found that **two** statutory aggravating circumstances were proven by the prosecution to be present beyond a reasonable doubt in Rust's murder of Michael Kellogg. App. pp. 32, 38. At the conclusion of the "proof" phase of the sentencing analysis required by § 29-2522, Rust was exposed to a sentence of death. Rumsey, under Arizona law, was not.

B.

Bullington v. Missouri

Bullington v. Missouri, 451 U.S. 430 (1981), upon which *Rumsey* relies, is even more clearly distinguishable and more clearly highlights the distinction between the legitimate concerns of the Double Jeopardy Clause and the realities of Rust's case.

Bullington involved a **general** jury verdict that life had been determined to be the appropriate penalty. Although it was clear under Missouri law that in order to vote a sentence of death the "prosecution was required to

prove – beyond a reasonable doubt or otherwise – additional facts in order to justify the particular sentence", *Id.* at 439, the general verdict imposing a sentence of life imprisonment prevented any appellate analysis of the analytical process by which the jury arrived at that verdict. It is entirely possible that Bullington's jury found aggravation to have been proven beyond a reasonable doubt, but that Bullington escaped death in the latter "weighing" portion of the analysis required of his jury. No one knows. *Rumsey*, at 215 (Rehnquist, J., dissenting).

In *Bullington*, the majority employed the following exception to the general rule that the Double Jeopardy Clause does not prevent the imposition of a more severe punishment upon retrial.

> A defendant may not be retried if he obtains a reversal of his conviction on the ground that **the evidence was insufficient** to convict.
>
> . . .
>
> Thus, the "clean slate" rationale recognized in *Pearce* is inapplicable whenever a jury agrees or an appellate court decides that the prosecution **has not proved its case**.

Id. at 442-443 (emphasis added).

There has been no *Bullington*-style failure of proof in Rust's case, as occurred in *Rumsey*. Under Nebraska statutes the State's **only burden** is to prove beyond a reasonable doubt the existence of one or more statutory aggravating factors. That burden the State clearly met before Rust's sentencing panel. Two aggravators were proven beyond a reasonable doubt. App. pp. 32, 38. The remainder of the analysis required of a sentencing panel

by § 29-2522 is not subject to further proof by the State, but subject only to a subjective exercise of the sentencing court's discretion.

C.

Poland v. Arizona

In *Poland v. Arizona*, 476 U.S. 147 (1986), as in *Rumsey*, the trial level sentencing court misinterpreted a statutory aggravating circumstance and thus found that circumstance not supported by the evidence the prosecution had offered. On appeal the prosecution argued that the evidence offered was sufficient to meet a properly interpreted aggravator, the Arizona Supreme Court agreed and remanded the matter for further proceedings. *Poland* at 148-151.

Poland raised his Double Jeopardy Clause claim at his re-sentencing claiming he had been "acquitted" of another aggravating circumstance by the trial court's determination that the evidence offered by the prosecution in support of that aggravator was insufficient. Rejecting that argument, this court stated:

> We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes.

Id. at 152.

> We hold, therefore, that the trial judge's rejection of the "pecuniary gain" aggravating circumstance in this case was not an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose its consideration by the reviewing court. Furthermore, because the **reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty**, there was no death penalty "acquittal" by that court. The Double Jeopardy Clause, therefore, did not foreclose a second sentencing hearing at which the "clean slate" rule applied.

Id. at 157 (emphasis added).

IV.

THE DOUBLE JEOPARDY CLAUSE DOES NOT ATTACH TO THE SOLELY SUBJECTIVE EXERCISE OF A SENTENCING COURT'S DISCRETION.

The penalty phase of a first degree murder case under Nebraska law is distinct from the guilt phase. At the guilt phase the prosecution is obligated to offer evidence which establishes **every** element of the offense charged, and if the prosecution fails to offer such evidence the defendant is acquitted and jeopardy attaches.

However, under Nebraska statutes the burden upon the prosecution at the penalty phase is significantly different. The **only** burden the prosecution assumes at the penalty phase is to offer evidence sufficient to establish beyond a reasonable doubt that one or more statutory aggravating circumstances are present in the commission of the murder or the history of that defendant. § 29-2522(1). Below the prosecution met that burden and

the Nebraska Supreme Court did not find error in the trial court's findings in that respect. The sentencing panel found two statutory aggravating circumstances present in Rust's murder of Michael Kellogg. App. pp. 32, 38. At that juncture the prosecution's burden to forward **evidence** ended.

A finding that the prosecution has met its burden to prove that one or more statutory aggravating circumstances exist, while it ends the prosecution's obligation to present evidence, does not conclude the court's required sentencing analysis under § 29-2522. Several other analytical steps remain, but those steps **do not hinge** upon additional evidence. Those remaining steps are exercises of judicial discretion wholly analogous to the normal criminal sentencing processes to which jeopardy clearly does not attach. *Bullington v. Missouri, supra; United States v. DiFrancesco,* 449 U.S. 117 (1980); *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973); *Stroud v. United States,* 251 U.S. 15 (1919).

Under these circumstances, *Poland* indicates that jeopardy has not attached in Rust's re-sentencing proceeding, and the Double Jeopardy Clause would not be offended by a remand for further trial level proceedings if error were discovered on appeal. It is in reaching the contrary conclusion in its interpretation of our federal constitution that we believe the Nebraska Supreme Court erred in this case.

QUESTION 2. Whether the Double Jeopardy Clause of the federal constitution is implicated in the direct appellate review of a capital sentencing proceeding.

We also believe the Nebraska Supreme Court misinterpreted our federal constitution when it concluded that the direct appellate review of a murder sentence violated the Double Jeopardy Clause of our federal constitution. That determination also appears to be in conflict with prior decisions of this court.

Rust's first sentencing determined that the appropriate sentence for his murder of Michael Kellogg was death. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied*, 434 U.S. 912, *reh'g denied*, 434 U.S. 988 (1977). Rust's second sentencing occurred at Rust's prayer. *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993). Therefore, his re-sentencing proceeding did not pose double jeopardy concerns and Rust raised none. If the re-sentencing itself did not offend the Double Jeopardy Clause, then we perceive no reason that direct appellate review of that proceeding should raise jeopardy concerns.

We note that in *Rumsey* and in *Poland* the murderer's double jeopardy concerns were first properly addressed when re-sentencing began at the trial court level when risk of jeopardy, in fact, occurred. *Id.* at 207. All other considerations notwithstanding, Rust's case was simply not at a juncture of these proceedings where a Double Jeopardy Clause claim could be properly raised or evaluated. "If a second sentencing proceeding ordinarily does not violate the double jeopardy clause, we fail to see how an **initial** sentencing proceeding could do so." *Schiro v.*

Farley, 510 U.S. ___, 114 S.Ct. 783, 127 L.Ed.2d 47, 57 (1994) (emphasis added).

CONCLUSION

The Nebraska Supreme Court has failed to note and employ the constitutionally significant concept that while jeopardy may attach to a capital sentencing proceeding where the prosecution has been found to have failed to meet its burden of proof with respect to the objective factual criteria necessary to create a death-possible case, jeopardy does not attach to the wholly discretionary and subjective judicial "weighing" process required to be undertaken by the sentencing entity once that objective factual threshold has been crossed by the prosecution. In Rust's case, the record clearly demonstrates that the prosecution did, in fact, carry its only burden of proof, and thus "proved its case", in this capital sentencing proceeding.

Furthermore, the Nebraska Supreme Court erred in its conclusion that the Double Jeopardy Clause was implicated at all in the direct appellate review of a capital sentencing proceeding.

Respectfully submitted,

DON STENBERG
Attorney General
J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellant and Cross-Appellee,
v.
John E. Rust, Appellee and Cross-Appellant.

Case Caption

State v. Rust

Filed March 3, 1995. No. S-94-376.

Appeal from the District Court for Douglas County: Stephen Illingworth, J. Patrick Mullen, and Ronald E. Reagan, Judges. Affirmed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

Emil M. Fabian and Barbara Thielen, of Fabian & Thielen, for appellee.

John E. Rust, pro se.

1. Criminal Law: Judgments: Appeal and Error. In general, in the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case.

2. Constitutional Law: Double Jeopardy. The Double Jeopardy Clause contained in U.S. Const. amend. V forbids the retrial of a defendant who has been acquitted of the crime charged.

3. Sentences. The imposition of a particular sentence usually is not regarded as an acquittal of a more severe sentence that could have been imposed.

4. Constitutional Law: Double Jeopardy: Sentences. As a general matter, the Double Jeopardy Clause contained in U.S. Const. amend. V imposes no absolute prohibition of a harsher sentence at retrial after a defendant has succeeded in having an original conviction set aside.

5. Constitutional Law: Double Jeopardy: Sentences: Death Penalty. If the sentencing proceeding resembles in all relevant respects a trial on the guilt or innocence phase, the Double Jeopardy Clause contained in U.S. Const. amend. V prohibits the imposition of a death sentence after a sentence of life has been imposed.

6. Convictions: Appeal and Error. A conviction reversed on appeal is nullified and the slate wiped clean.

7. Sentences: Death Penalty. One cannot concurrently serve a term of years with a death sentence.

8. Homicide: Sentences. On being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence.

9. Records: Appeal and Error. The proper place to make a record is in the trial court, not in an appellate court.

10. Appeal and Error. Absent plain error, an issue raised for the first time in an appellate court is disregarded, as the trial court could not have committed an error on an issue not presented and submitted.

11. Records: Appeal and Error. A party's brief may not expand the evidentiary record.

12. ___: ___. An appellate brief must limit itself to arguments supported by the appellate record.

White, C.J., Caporale, Fahrnbruch, Lanphier, Wright, and Connolly, JJ., and Boslaugh, J., Retired.

PER CURIAM.

Because of events which took place on February 21, 1975, the defendant-appellee, John E. Rust, was found guilty in the district court of one count of felony murder and three counts of shooting with intent to kill, wound, or maim. He was thereafter, on October 30, 1975, sentenced to death on the murder conviction and to imprisonment for concurrent periods of not less than 16 2/3 nor more than 50 years on each of the shooting convictions. He was later, on March 25, 1994, resentenced on the murder conviction to life imprisonment. This being a case in which a life sentence was imposed and a sentence of death is sought, the plaintiff State, under the provisions of Neb. Rev. Stat. § 24-1105 (Cum. Supp. 1994), appealed directly to this court, claiming the sentence to be excessively lenient. Rust resists that claim and cross-appeals, asserting he has been improperly denied credit for the time he has already served. We affirm.

BACKGROUND

On Rust's direct appeal, we rejected his various challenges to the October 1975 judgment of the district court and affirmed. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198.

Rust then unsuccessfully challenged his murder conviction and sentence under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1989).

State v. Rust, 208 Neb. 320, 303 N.W.2d 490 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194.

Rust next brought an action in the federal district court, but because certain claims had not been exhausted at the state level, he was required to seek further postconviction relief in the state courts; relief was again denied. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987).

After unsuccessfully seeking state habeas corpus relief, *Rust v. Gunter*, 228 Neb. 141, 421 N.W.2d 458 (1988), Rust initiated a habeas corpus action in the federal district court.

The federal district court abstained from considering certain issues but ordered that Rust's murder sentence be reduced to life imprisonment unless the State initiated capital sentencing proceedings. Upon the respondent warden's appeal, the U.S. Court of Appeals for the Eighth Circuit remanded the cause for consideration of the remaining issues. *Rust v. Clarke*, 960 F.2d 72 (8th Cir. 1992).

The federal district court then entered an additional order granting habeas relief on Rust's claim of ineffective assistance of counsel at the initial sentencing proceeding. Accordingly, the federal district court entered judgment in favor of Rust and again ordered that his murder sentence be reduced to life imprisonment unless the State initiated capital resentencing. Appeal was taken once again, whereupon the Eighth Circuit affirmed the federal district court's judgment, holding that this court's earlier finding that the existence of each of the aggravating

factors was proven beyond a reasonable doubt violated due process. *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993). The U.S. Supreme Court denied the State's request for certiorari. *Hopkins v. Rust*, ___ U.S. ___, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993).

The State then instituted resentencing proceedings. A hearing was held before a three-judge panel, which ordered that Rust be sentenced to life imprisonment and that such sentence be served consecutively to the sentences previously imposed on the three shooting counts.

STATE'S APPEAL

Claiming that the sentencing panel erred in its consideration of various aggravating circumstances, the State undertook this appeal under the authority found in Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994):

> Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the county attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

Rust argues that the imposition of a life sentence after the capital sentencing proceeding used here constitutes an acquittal of the death penalty and that as a result, the Double Jeopardy Clause contained in U.S. Const. amend. V prohibits any reconsideration of such sentence.

We note that in *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), we considered and affirmed a life sentence for a conviction of first degree murder which the State had appealed under § 29-2320 as being excessively lenient. We therein announced that the standard of review when the State appeals and claims that a sentence is excessively lenient is whether the sentencing court abused its discretion in the sentence imposed. We observe, however, that the parties did not raise, and we thus did not consider, the issue of whether the State may appeal under § 29-2320 a life sentence for a conviction of first degree murder. The question is therefore one of first impression.

In general, in the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case. *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991); Neb. Rev. Stat. §§ 29-2315.01 and 25-1912 (Cum. Supp. 1994). Moreover, it is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); *Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962).

However, the imposition of a particular sentence usually is not regarded as an "acquittal" of a more severe sentence that could have been imposed. *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). Thus, as a general matter, the Double Jeopardy Clause imposes no absolute prohibition of a harsher sentence at

retrial after a defendant has succeeded in having an original conviction set aside. *Bullington, supra.* See, also, *DiFrancesco, supra; Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *Stroud v. United States,* 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919).

But because Missouri's presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence, the Court in *Bullington, supra,* reasoned that the first sentencer's imposition of a life sentence operated as an acquittal of the death sentence. Thus, the Double Jeopardy Clause prevented imposition of the death sentence after the first sentence was vacated.

In so holding, the *Bullington* Court identified several characteristics of Missouri's sentencing proceeding that made it comparable to a trial for double jeopardy purposes. First, the discretion of the sentencer, the jury, was restricted to precisely two options: death or life imprisonment without possibility of release for 50 years. Second, the sentencer was to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembled a trial. Finally, the prosecution had to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. For those reasons, the *Bullington* Court determined that the Missouri sentencer had to determine that the prosecution failed to prove its case when it imposed a sentence of life imprisonment in a capital sentencing proceeding.

The *Bullington* Court explained that the sentencing procedures it had considered in the past did not have the

hallmarks of a trial on guilt or innocence. The Court specifically noted that the sentencing procedures previously considered did not require a separate sentencing proceeding at which the prosecution was required to prove particular facts beyond a reasonable doubt to justify a particular sentence. Moreover, in the previously considered noncapital sentencing procedures, the sentencer's discretion was essentially unfettered. See, *Chaffin, supra; North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *Stroud, supra.* Thus, the *Bullington* Court reasoned that the values underlying the principle that a verdict of acquittal on the issue of guilt or innocence is absolutely final were equally applicable when a sentencer rejected the state's claim that a defendant deserved to die.

As stated in *Green v. United States,* 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The *Bullington* Court further reasoned that the " 'embarrassment, expense and ordeal' " and the " 'anxiety and insecurity' " faced by a defendant at the penalty phase of a Missouri capital murder trial were at least equivalent to that faced by any defendant at the guilt

phase of a criminal trial. 451 U.S. at 445. The " 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' " thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. *Id.*, quoting *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). The *Bullington* Court reasoned that Missouri's use of the reasonable doubt standard indicated that in a capital sentencing proceeding, it was the State, not the defendant, that should bear " 'almost the entire risk of error.' " 451 U.S. at 446, quoting *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The *Bullington* Court also cautioned that its decision did not depend on the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that the petitioner deserved the death penalty. The Court emphasized that its decision was based upon the principle that the state, having had " 'one fair opportunity to offer whatever proof it could assemble,' . . . is not entitled to another." 451 U.S. at 446.

The *Bullington* rationale was extended in *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), to a capital sentencing scheme in which the judge, as opposed to a jury, had initially determined that a life sentence was appropriate.

The *Rumsey* jury convicted the defendant of first degree murder resulting from an armed robbery. In accordance with Arizona's statutory capital sentencing scheme, the trial judge, without a jury, thereafter conducted a separate hearing on the appropriate sentence. Aggravating and mitigating circumstances were considered to determine whether death was the appropriate sentence. At the hearing, the state argued that three statutory aggravating circumstances were present. The defendant countered that no aggravating circumstances were present, but that several mitigating circumstances were.

The trial judge found no aggravating circumstances present and specifically found that the defendant did not commit the offense for the receipt or in expectation of anything of pecuniary value. Finding no aggravating circumstances present, the trial judge sentenced the defendant to life imprisonment without possibility of parole for 25 years, as statutorily mandated for first degree murder when the death penalty was not imposed. The trial judge also sentenced the defendant to a consecutive term of imprisonment for 21 years on the armed robbery conviction.

The defendant appealed, arguing that the imposition of consecutive sentences violated both federal and state law. Under Arizona law, the defendant's appeal permitted the state to file a cross-appeal from the life sentence. In the cross-appeal, the state contended that the trial court had committed an error of law in interpreting the pecuniary gain aggravating circumstance to apply only to contract killings. The state supreme court rejected the defendant's challenge to his sentence; however, it agreed that the trial court had misinterpreted an aggravating

circumstance. Because of the trial court's misinterpretation, the Arizona Supreme Court concluded that the previously imposed sentence of life imprisonment would have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing. The sentence for armed robbery was left undisturbed.

On remand, the trial court held a new sentencing hearing; neither party presented any new evidence, but the defendant argued that imposing the death penalty would violate *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). The trial court found that the aggravating circumstance concerning commission of the murder for pecuniary gain was the only aggravating circumstance present and further found that no mitigating circumstances were sufficiently substantial to call for leniency. This time the trial court sentenced the defendant to death as required under Arizona statute.

In his mandatory appeal to the Arizona Supreme Court, the defendant argued that imposition of the death sentence on resentencing, after he had effectively been acquitted of death at his initial sentencing, violated the Double Jeopardy Clause of the Fifth Amendment. The Arizona Supreme Court agreed and ordered the defendant's sentence for first degree murder reduced to life imprisonment.

Granting certiorari, the U.S. Supreme Court determined that the Arizona sentencing proceeding shared the characteristics of the Missouri proceeding that made it resemble a trial for purposes of the Double Jeopardy Clause. Specifically, the Court noted that the sentencer,

the trial judge, was required to choose between two options, death or life imprisonment, and that the decision was guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death could not be imposed unless one aggravating circumstance was found, whereas death was required if there was one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer was required to make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involved the submission of evidence and the presentation of argument. The Court further noted that the usual rules of evidence governed the admission of evidence of aggravating circumstances and that the state had to prove the existence of aggravating circumstances beyond a reasonable doubt. The Court held that for double jeopardy purposes, these characteristics made the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri.

The U.S. Supreme Court also noted that in making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. However, the Court reasoned that reliance on an error of law did not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. The Court stated that the fact that acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but does not alter its essential

character. Therefore, the Court concluded that an acquittal on the merits barred retrial even if based on legal error.

The *Rumsey* Court further reasoned that the fact that the sentencer was the trial judge rather than the jury did not render the sentencing proceeding any less like a trial, citing *United States v. Morrison*, 429 U.S. 1, 97 S. Ct. 24, 50 L. Ed. 2d 1 (1976) (Double Jeopardy Clause treats bench and jury trials alike). The Court further explained that the availability of appellate review, including reweighing of aggravating and mitigating circumstances, did not make the appellate process part of a single continuing sentencing proceeding. The Court additionally determined that as no appeal need be taken if life imprisonment were imposed, the appellate reweighing could work only to a defendant's advantage. Therefore, the Court held that a sentence imposed after a completed Arizona capital sentencing hearing is a judgment which triggers the protections of the Double Jeopardy Clause.

Neb. Rev. Stat. § 29-2520 (Reissue 1989) requires that after one is found guilty of first degree murder, the trial judge or a three-judge panel conduct a separate hearing to determine the sentence to be imposed. The procedure is found in Neb. Rev. Stat. § 29-2522 (Reissue 1989):

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Neb. Rev. Stat. § 29-2523 (Reissue 1989) defines a number of aggravating and mitigating circumstances. Although the Nebraska sentencer is not limited to a consideration of only the statutorily defined mitigating circumstances, *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), the situation with respect to aggravating circumstances is otherwise. What constitutes an aggravating circumstance is left neither to the discretion of the sentencer nor to this court, but is controlled by statute. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), *cert. denied*, 484 U.S. 905, 108 S. Ct. 247, 98 L. Ed. 2d 205 (1987). Aggravating circumstances must be proved beyond a reasonable doubt. *Id.*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

The capital sentencing procedure of this state shares the same characteristics which the U.S. Supreme Court found to resemble a trial in the Arizona and Missouri capital sentencing proceedings. Under Nebraska law, first degree murder is punishable by death or life imprisonment. Neb. Rev. Stat. §§ 28-303 and 28-105 (Reissue 1989). Therefore, the sentencer is not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing is required, and the sentencer is required to choose between

the above-mentioned two options and only those options. See § 28-303. Moreover, statutory standards guide the sentencer's choice between a sentence of life or death. Furthermore, here the State did not simply recommend what it felt to be an appropriate punishment, it undertook the "burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

The fact that the Nebraska sentencer is a three-judge panel instead of a single judge or a jury is not important. See *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984). Nor does the availability of appellate review make the appellate process part of a single continuing sentencing proceeding. *Id.*

Similarly, the discretion granted the sentencer with regard to the admission of evidence regarding nonstatutory mitigating circumstances does not destroy the trial analogy. See, Mo. Ann. Stat. § 565.012 (Vernon 1979); Ariz. Rev. Stat. Ann. § 13-703 (1989); *Bullington, supra; Rumsey, supra.* Moreover, as in Missouri and Arizona, in our sentencing proceeding the admission of evidence is restricted by the rules of relevancy. See, Neb. Rev. Stat. § 29-2521 (Reissue 1989); Mo. Ann. Stat. § 565.012.1; Ariz. Rev. Stat. Ann. § 13-703.

Nor is the fact that Rust was initially sentenced to death of any significance, for that sentence was found to be constitutionally infirm and thus of no force or effect. See *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L.

Ed. 2d 123 (1986) (conviction reversed on appeal is nullified and slate wiped clean). We heretofore have acknowledged that an appellate finding of insufficient evidence to convict is tantamount to an acquittal. Therefore, once the reviewing court has found the evidence legally insufficient, the Double Jeopardy Clause precludes a second trial. *Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Lee,* 227 Neb. 277, 417 N.W.2d 26 (1987). We have also previously recognized that *Bullington, supra,* and *Rumsey, supra,* applied the protection of the Double Jeopardy Clause to certain capital sentencing procedures. *State v. Rust,* 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). We recognize that in *Poland,* the Double Jeopardy Clause was held not to prohibit the reimposition of a sentence of death after the original such sentence had been nullified on appeal. However, the difference between the situation presented here and that presented in *Poland* is that here, there was an intervening life sentence. It is the life sentence imposed at the resentencing hearing which served to acquit Rust of the harsher death sentence. Accordingly, the holdings of the U.S. Supreme Court in *Bullington, Poland,* and *Rumsey* make the protections of the Double Jeopardy Clause applicable to the capital resentencing procedure involved and prevent the State from challenging as excessively lenient the life sentence imposed in this case.

RUST'S CROSS-APPEAL

In his cross-appeal, Rust asserts that the sentencing panel erred in not crediting the life sentence it imposed

with the time he spent imprisoned on the earlier sentence of death for the first degree felony murder conviction.

First, he urges that as the original sentencer did not specify whether the death sentence on the murder conviction was to be served concurrently or consecutively with the sentences on the shooting convictions, the death sentence was to be served concurrently with those other sentences. But it is clear that one cannot concurrently serve a term of years with a death sentence.

> One may, while alive, simultaneously serve time to be applied to two sentences. He may not, however, be at the same time alive and dead, as the definition of one condition excludes the other. Consequently, any rule that in the absence of a consecutiveness direction two sentences pronounced at the same time by the same court are to be served concurrently can have no application when death has been imposed as one of the sentences.

State v. Jones, 218 Neb. 713, 715, 358 N.W.2d 765, 767 (1984). Thus, there is no merit to that argument.

Rust next argues that Neb. Rev. Stat. § 83-1,106 (Reissue 1994) mandates that credit be given for time an offender has spent in custody. That statute provides that an offender be given credit against the maximum term and any minimum term for time spent in custody as a result of the criminal charge for which a prison sentence is imposed. However, on being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524

N.W.2d 551 (1994); *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).

> The purpose of credit under § 83-1,106
>
> > is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense. . . . By its very nature [a life] sentence is indefinite. . . . In the case of a life sentence, it is impossible to impose punishment exceeding the term prescribed by statute.

Lynch, 215 Neb. at 537, 340 N.W.2d at 134.

Thus, neither is there any merit to Rust's second argument.

Finally, Rust attempts to make an argument that by virtue of the manner in which, under the policy and procedure manual of the Nebraska Board of Parole, a prisoner becomes eligible for having a life sentence commuted to a definite number of years and thereby becomes eligible for parole consideration, he is disadvantaged by the fact that the correction of his death sentence occurred after he had already spent a number of years in prison. But not only was the manual not made a part of the record below, the record is silent as to how the policy is to be applied to Rust. We thus do not reach the argument.

In so ruling, we are not unmindful that we earlier rejected the parties' joint stipulation to expand the record to include a portion of the manual. But the proper place to make a record is in the trial court, not in an appellate court. See, *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993) (absent plain error, issue raised for first time in

appellate court disregarded, as trial court could not have committed error on issue not presented and submitted); *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989); *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960). Nor does the fact that Rust included part of the manual in his brief change the situation, for a party's brief may not expand the evidentiary record. See, *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993); *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993). An appellate brief must limit itself to arguments supported by the appellate record. *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

CONCLUSION

Accordingly, the judgment below is affirmed.

AFFIRMED.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

April 12, 1995

J. Kirk Brown
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0376, State v. John E. Rust

Appellant/State Motion for Rehearing filed 03/13/95 **has been reviewed by the court and the following order entered:** Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, -vs.- JOHN EDWARD RUST, Defendant.	)	Docket 91 Page 55 **ORDER OF SENTENCE**

THIS MATTER came on for resentencing of the defendant, John Edward Rust, on Count I of the Information on the 25th day of March, 1994. The defendant was present in person with his attorneys, Emil M. Fabian and Barbara Thielen. The State of Nebraska was represented by J. Kirk Brown, Assistant Attorney General.

The court informed the defendant that on August 1, 1975, pursuant to jury verdict, he had been convicted of the crime of Murder in the First Degree in the commission of or attempt to commit a robbery. The court then asked the defendant if the defendant or his counsel had anything to say as to why judgment and sentence should not be passed against him. Neither the defendant nor his counsel made any statement or showing as to why sentence should not be imposed at this time.

The court then asked the defendant and his counsel if there were any other matters to be presented, in addition to the evidence adduced from January 31 through February 2, 1994, concerning the nature of the sentence to be imposed on the defendant. No further evidence was adduced, and no further argument was made.

I

PROCEDURAL BACKGROUND

Pursuant to jury verdicts, on August 1, 1975, the defendant was adjudged guilty in Count I of first-degree murder during the commission of or attempt to commit a robbery and in Counts II, III and IV of shooting with intent to kill, wound, or maim. After a pre-sentence investigation by the Douglas County adult probation office, the defendant was sentenced by the trial judge to concurrent terms of imprisonment of 16 2/3 to 50 years on Counts II, III and IV, and on October 30, 1975, a three judge sentencing panel imposed a sentence of death on Count I, the first-degree murder conviction. The convictions and sentences were affirmed by the Nebraska Supreme Court on direct appeal, *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, *cert. denied*, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977).

After several unsuccessful post conviction proceedings in the Nebraska state courts, the defendant sought habeas corpus relief in the federal courts, pursuant to 28 U.S.C. §2254. In *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993), the United States Court of Appeals for the Eighth Circuit affirmed the federal district court's finding that the original sentencing panel had not clearly applied the "beyond a reasonable doubt" standard of proof in determining the existence of the aggravating circumstances on which it had relied in imposing the sentence of death. The federal district court further ordered that the defendant's sentence be reduced to life imprisonment unless

the State of Nebraska initiated capital resentencing proceedings within 60 days after the federal court's judgment became final. The State of Nebraska timely initiated capital resentencing proceedings.

Pursuant to a suggestion of disability or disqualification by the clerk of the district court, under the provisions of Neb. Rev. Stat. §29-2520 (Reissue 1989), the Honorable William C. Hastings, Chief Justice of the Nebraska Supreme Court, by written order, appointed District Judges Ronald E. Reagan and Stephen R. Illingworth to sit with the designated trial judge, Judge J. Patrick Mullen, as a panel to make the determination of the sentence to be imposed on the defendant.

II

FACTUAL BACKGROUND

The following are general findings of fact made by the panel. There are other facts which will be more specifically detailed in this order as they apply to aggravating and mitigating circumstances.

The defendant John Rust and two accomplices, Ronald Ell and Donald Fread, committed an armed robbery of a Hinky Dinky store on North 30th Street in Omaha, Nebraska, on February 21, 1975. Defendant John Rust and Ronald Ell entered the store armed with pistols and a sawed-off shotgun, while Donald Fread stayed in the getaway car as its driver.

The robbers fled the scene after the robbery and officers of the Omaha Police Department immediately gave chase. One or more occupants of the automobile in

which the defendant was riding fired shots at an Omaha police cruiser operated by Officer George Allen. Eventually the path of the defendant's vehicle was blocked by a police cruiser driven by Officer Joseph Nepodal at approximately Minnelusa Boulevard & Iowa Street. Gunfire was exchanged between Omaha police officers and occupants of the defendant's automobile, and defendant's driver Donald Fread was killed by a shot fired by one of the police officers. Defendant John Rust and Ronald Ell left the vehicle and fled from it on foot to the backyards of the residential neighborhood between Iowa Street and Sharon Drive.

At approximately the same time, Omaha Police Officer Russell Wolf arrived on Sharon Drive and was alerted by an armed civilian, Michael Kellogg, that the suspects were in the backyard of 2519 Sharon Drive. Officer Russell Wolf heard the victim Michael Kellogg shout for the defendant John Rust to stop. Then, Michael Kellogg fired two shots at the defendant, who appeared to slump as if hit as he was attempting to climb over a fence. The defendant Rust then ran in a northwesterly direction toward the rear of 2519 Sharon Drive. Without waiting for Officer Wolf, who was following a short distance behind, Michael Kellogg ran around to the east side of 2519 Sharon Drive and into the backyard where Officer Wolf saw Michael Kellogg turn in a northwesterly direction, raise his pistol and fire one or two more shots toward the rear of the house. Officer Wolf then heard gunfire from a weapon other than Michael Kellogg's, and as Officer Wolf rounded the southeast corner of 2519 Sharon, he saw Michael Kellogg start to fall; he then observed the defendant fire two more shots at the falling Michael Kellogg

from approximately 40 feet away. Officer Wolf then pointed his shotgun at the defendant and attempted to fire it. The weapon would not fire since the safety mechanism was on. Defendant Rust then turned and shot Officer Wolf in the hip.[1] The defendant then ran westbound into an adjoining yard and was subsequently apprehended lying under some evergreen bushes after being wounded by additional gunfire from Omaha police officers.

III

THE PENALTY-PHASE HEARING

A hearing on the aggravating and mitigating circumstances was held before the three judge panel beginning on January 31, 1994, and concluding on February 2, 1994. Prior to that hearing, a complete transcript of the testimony adduced at the defendant's 1975 trial, except for the sentencing proceeding, and at the defendant's 1978 post-conviction proceeding was furnished to each of the members of the panel. This testimony was received and examined by each of the judges. In addition to the oral testimony of witnesses adduced by counsel, the following exhibits were received in evidence at the sentencing hearing or are received in evidence by this order and have been considered by the members of the panel in reaching their conclusion:

---

[1] This panel acknowledges that Rust's co-defendant, Ronald Ell, has now testified that it was he, not Rust, who shot Kellogg and Wolf. Ell's testimony in this regard is simply not worthy of belief, and we find, beyond a reasonable doubt, that the factual basis we outlined is established by the evidence.

(A) *Offered by stimulation of counsel:*

(1) Exhibits 101-112, a five-volume transcript of the 1975 trial, including some of the physical exhibits which were received in evidence at the trial, and a seven-volume transcript of the 1978 post-conviction proceedings. Exhibit 105, the testimony of selected trial witnesses, duplicates portions of Exhibits 101, 102, and 103. Exhibit 110, the testimony of Dr. Jerry W. Jones, duplicates portions of Exhibits 106 and 107. Exhibit 111, the testimony of Ronald Raymond Ell, duplicates a portion of Exhibit 106.

(B) *Offered by the State of Nebraska*:

(1) Exhibit 124, a certified copy of the Judgment and Sentence entered against the defendant on October 30, 1975, in the District Court of Douglas County, Nebraska, on three counts of shooting with intent to kill, wound, or maim arising from the same incident for which he is now being resentenced on Count I.

(2) Exhibits 125-127, certified copies of court documents relating to the defendant's 1970 conviction in the Circuit Court for the Second Judicial Circuit of South Dakota (Minnehaha County) on charges of assault with intent to inflict great bodily injury and grand larceny. Exhibit 125 is a copy of the Information charging the defendant and Douglas Jibben with robbery, as well as the offenses of conviction, arising from an incident on December 6, 1969, involving a victim named

Harold Chapman. Exhibit 126 is a copy of the Judgment of Conviction and Sentence entered against the defendant, following a plea of guilty at which he was represented by counsel, on charges of assault with intent to inflict great bodily injury and grand larceny. Exhibit 127 is a copy of the Official Statement by Marvin D. Keller, Deputy State's Attorney, dated January 30, 1970, which was submitted to the Warden of the South Dakota State Penitentiary.

(3) Exhibits 128, 128-A, and 128-B, materials relating to criminal activity of which the defendant was convicted or in which he was alleged to have been involved in South Dakota. Exhibit 128 is the deposition of Mark Thorstenson, of the Sioux Falls, South Dakota, Police Department, taken on January 20, 1994. Thorstenson is the supervisor of Sgt. Roger Dunn, the records custodian for the Sioux Falls Police Department, who was apparently on vacation at the time of the deposition, which was offered as foundation for the accompanying police reports. Exhibit 128-A is a copy of a case report of the Minnehaha County Sheriff's Dept. concerning the incident (referred to above) on December 6, 1969, involving Harold Chapman. Exhibit 128-B is a copy of a case report of the Sioux Falls Police Department regarding the armed robbery of Getten's Red Owl Food Store in Sioux Falls on April 19, 1974, in which the defendant was a suspect, but for which he was ultimately not charged.

(4) Exhibit 129, the deposition of Merlin R. VanderMaten, a former deputy sheriff in the Minnehaha County Sheriff's Office, taken January 21, 1994. Mr. VanderMaten was present, along with reporting officer G. Newman, for the interview of Harold Chapman concerning the incident on December 6, 1969, and he typed the case report (Exhibit 128-A) of the incident, which was compiled from his notes and those of Officer Newman.

(5) Exhibit 131, the affidavit of Ted Bartunek, Intelligence Technician, Division of Criminal Investigation, South Dakota Attorney General's Office, Pierre, South Dakota, dated January 21, 1994. Mr. Bartunek is the custodian of records for the Division of Criminal Investigation (DCI), and accompanying his affidavit is a transcription of microfilm records of the DCI concerning the armed robbery of the Fulton State Bank, Fulton, South Dakota, on April 8, 1974, in which the defendant and Ronald Ell were suspects.

(C) *Offered by the defendant, John Edward Rust:*

(1) Exhibit 113, the defendant's Pre-Sentencing Memorandum, dated January 27, 1994, which was offered in lieu of an opening statement by counsel. The memorandum generally discusses the applicability of various aggravating and mitigating circumstances to the homicide for which the defendant is being resentenced.

(2) Exhibits 114 and 115, a synopsis of various first degree murder cases in

Nebraska, offered for purposes of the comparative review required by Neb. Rev. Stat. §29-2522(3) (Reissue 1989). Exhibit 114 discusses cases in which a death sentence was imposed, while Exhibit 115 summarizes cases in which a sentence of life imprisonment was imposed either originally or after vacation of a previously imposed sentence of death.

(3) Exhibits 116 and 117, the videotape, and accompanying transcript, of a deposition of Frances Rust, the mother of the defendant, taken January 21, 1994, at the Minnehaha County Courthouse, Sioux Falls, South Dakota. Mrs. Rust testified generally about the defendant's birth, childhood, and early adult life.

(4) Exhibits 118 and 119, the videotape, and accompanying transcript, of a deposition of Caryn S. Hacker, M.S.W., taken January 26, 1994, in Omaha, Nebraska. Ms. Hacker, a psychotherapist and diplomate in clinical social work, testified concerning her psycho-social evaluation and diagnostic impression of the defendant.

(5) Exhibits 120-122, diplomas and achievement awards earned by the defendant in the preceding four years in several paralegal correspondence courses taken through either The Paralegal Institute, Phoenix, Arizona, or Southern Career Institute, Boca Raton, Florida.

(6) Exhibit 123, a compilation of sentencing orders in previous first-degree murder cases, offered, along with Exhibits 114

and 115, for purposes of comparative review.

(7) Exhibits 132 and 136, diagrams of (a) the backyard and the rear of the house at 2519 Sharon Drive, Omaha, Nebraska, and (b) the front and back of 2519 Sharon Drive and 2523 Sharon Drive.

(8) Exhibit 133, a letter from Charles Mandsager, retired Chief United States Probation Officer, District of South Dakota (1956-1982), regarding his involvement with the defendant, who, as a 17year-old federal juvenile probationer, was under the supervision of the writer and his staff.

(9) Exhibits 134 and 135, the Curriculum Vitae of Stephen M. Skulsky, Ph.D., a licensed and certified clinical psychologist, and the Psychological Evaluation of the defendant conducted by Dr. Skulsky on December 7, 1993. Dr. Skulsky also testified in person concerning his evaluation of the defendant.

The sentencing panel also had before it the district court file in this case, which file was not marked as an exhibit.

Based on the evidence, the panel proceeded to a consideration of the aggravating and mitigating circumstances set forth in Neb. Rev. Stat. §§29-2522 and 29-2523 (Reissue 1989), as well as the non-statutory mitigating circumstances proffered by the defendant.

IV

AGGRAVATING CIRCUMSTANCES

The panel finds as a matter of law that any determination that an aggravating circumstance exists shall be beyond a reasonable doubt.

Regarding the aggravating circumstances, the statutory definitions of which are hereafter set forth, the sentencing panel unanimously finds as follows:

1. Aggravating Circumstances:

(a) *The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity* (Section 29-2523(1)(a)).

No evidence was adduced tending to show that the defendant had previously been convicted of another murder, and thus the first part of the first clause of this subsection "the offender was previously convicted of another murder . . . " is clearly not applicable to the defendant.

With regard to the second part of the first clause of this subsection "the offender was previously convicted of . . . a crime involving the use or threat of violence to the person", the panel concludes that the three convictions of shooting with intent to kill, wound, or maim set forth in Exhibit 124 cannot be considered, since they arose from the same incident as the homicide for which the defendant is being resentenced. However, the evidence submitted by the State does indicate that the defendant has been convicted in South Dakota of assault with

intent to inflict great bodily injury, arising from an incident on December 6, 1969, involving a victim named 8arold Chapman. As contained in this subsection the phrase "use or threat of violence to the person" is inherent in the crime of assault with intent to commit great bodily injury. The Panel distinguishes this determination from the holding in *State v. Bird Head*, 225 Neb. 822, 837, (1987), in which the Nebraska Supreme Court found reversible error in the sentencing panel's reliance on 2 assaults of unknown degree and without ascertainment of a factual basis to support the determination. The panel therefore determines that this portion of aggravating circumstance (1)(a) is applicable to the defendant beyond a reasonable doubt.

To support the applicability of the second clause of this aggravating circumstance " . . . substantial history of serious assaultive or terrorizing criminal activity", the State has relied not only on the defendant's prior South Dakota conviction of assault with intent to inflict great bodily injury, but also on police reports (Exhibits 128-B and 131) indicating that the defendant and Ronald Ell were suspects in the armed robbery of Getten's Red Owl Food Store in Sioux Falls, South Dakota, on April 19, 1974, and in the armed robbery of the Fulton State Bank, Fulton, South Dakota, on April 8, 1974. The defendant objected, on both evidentiary and constitutional grounds, to the consideration of these exhibits. The panel concludes that the statutory rules of evidence are not strictly applicable at a capital sentencing hearing. Nebraska Revised Statute §29-2521 (Reissue 1989) provides that, "[i]n the proceeding for determination of sentence, evidence may be presented as to any matter that the court

deems relevant to sentence. . . . " and "[a]ny such evidence which the court deems to have probative value may be received." In *State v. Reeves*, 216 Neb. 206, 221-223, (1981), the Nebraska Supreme Court found that this statute provides for broader discretion in the admission of evidence than would otherwise be allowed under the rules of evidence. The panel determines that these exhibits do have probative value on the matter for which they were offered, and, on the basis of the foregoing analysis, the defendant's hearsay objection to Exhibits 128-B and 131 is overruled. Without specifically addressing the defendant's objections to these exhibits on due process and confrontation grounds, the panel concludes that, even though these exhibits may properly be considered, they are not sufficiently reliable to establish beyond a reasonable doubt the defendant's involvement in the criminal activity detailed in these exhibits, and, thus, the second clause of aggravating circumstance (1)(a) is not applicable to the defendant in this case.

(b) *The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator* (Section 29-2523[1)(b)).

The original sentencing panel in this case concluded that both prongs of this aggravating circumstance were applicable to the killing of Michael Kellogg, but on direct appeal, the Nebraska Supreme Court upheld only that portion of the panel's conclusion that the killing had been committed to conceal the identity of the perpetrator. In *State v. Rust*, 197 Neb. 528 (1977), the Supreme Court held that the murder couldn't have concealed the commission of the crime or the related assaults because it didn't in

fact destroy, nor was it an attempt to destroy, evidence of those crimes.

> We hold that a murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed as, for example, in a case where murder by arson is committed in an effort to conceal the evidence of commission of another crime, *e.g.*, another murder or burglary, or where the murder of a witness is likely to prevent the discovery of a prior crime not otherwise likely to be discovered.

Id. at 537. At the resentencing hearing, the State likewise argued that the "conceal the identity" prong of this aggravator is applicable, stating that the entire course of events surrounding the killing was part of the defendant's plan to escape capture for the robbery of the Hinky Dinky store at 30th and Weber Streets in Omaha.

Based on the evidence adduced at the resentencing hearing, we respectfully disagree that the killing of Michael Kellogg was committed to conceal the identity of John Rust as the perpetrator of a crime. Although John Rust and his accomplices were disguised at the time of the Hinky Dinky robbery, they shed their masks at some point during their pursuit by Omaha Police Division officers, and at the time Michael Kellogg confronted Rust in the backyard at 2519 Sharon Drive, Rust was likewise unmasked. We conclude that the defendant shot Michael Kellogg to further his efforts to escape capture for the robbery and related assaults on Omaha Police Division officers rather than to conceal his identity as perpetrator of a crime, and we accordingly find that the evidence fails

to show beyond a reasonable doubt that aggravating circumstance (1)(b) is applicable.

(c) *The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant* (Section 29-2523(1)(c)).

The State adduced no evidence to support the existence of aggravating circumstance (1)(c), and the sentencing panel concludes that it is not applicable in this case.

(d) *The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence* (Section 29-2523(1)(d)).

Although the murder of Michael Kellogg by the defendant was, indeed, tragic, it was effected, according to Dr. Jerry W. Jones, the pathologist who conducted the postmortem examination, by three bullets causing almost instantaneous death, without the imposition of extreme suffering on the victim. The State makes no argument for the existence of aggravating circumstance (1)(d), and we agree with the original sentencing panel's conclusion that it is not applicable in this case.

(e) *At the time the murder was committed, the offender also committed another murder* (Section 29-2523(1)(e)).

The State has presented no evidence that any victim other than Michael Kellogg was killed by the defendant, and the sentencing panel therefore concludes that aggravating circumstance (1)(e) is not applicable in this case.

(f) *The offender knowingly created a great risk of death to at least several persons* (Section 29-2523(1)(f)).

The Nebraska Supreme Court has interpreted this aggravating circumstance to cover "those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations." *State v. Simants*, 197 Neb. 549, 567, 250 N.W.2d 881, 891, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977); *State v. Stewart*, 197 Neb. 497, 524, 250 N.W.2d 849, 865 (1977).

The applicability of this aggravator was the subject of some dispute at the resentencing proceedings. On one hand, the State argued that, during his flight from the scene of the Hinky Dinky robbery, the defendant had engaged in a running gun battle with pursuing police officers, spraying round after round of live fire ammunition loose in the residential neighborhood through which the chase took place. On the other hand, the defendant argued that there was no indication that citizens were in the line of fire while the shootout with police officers was occurring, and that the mere possibility that uninvolved citizen bystanders might have been injured was not a sufficient basis on which to invoke this aggravating circumstance.

There is no question that the shots fired by the defendant at Michael Kellogg and Officer Russell Wolf in the backyard of 2519 Sharon Drive created a great risk of death to those two individuals, but the evidence does not establish beyond a reasonable doubt, at that point, that a

great risk of death extended to anyone else. There is also no question that the defendant has been convicted on two other counts of shooting with intent to kill, wound, or maim, based on the gunfight with Officers Allen and Nepodal during the robbers, flight from the Hinky Dinky store. However, it is unknown if the jury's verdicts on those two counts determined the defendant to be guilty as a principal, or as an aider and abettor to Ronald Ell.

Although Officer Allen testified that both passengers in the getaway vehicle were in a position to fire at him during his pursuit of them, he was only certain that a passenger leaning out the right side of the vehicle had actually fired, and, because the suspects were still masked, he was unable to identify which of the suspects it was. Officer Allen testified at trial that, as the gun battle continued on Iowa Street, he took fire from at least two of the suspects, but he was unable to identify which of them were firing. We think it improbable that the defendant sat through the entire pursuit without firing a shot, as both he and Ronald Ell have claimed, particularly in view of his ready resort to gunfire when later cornered on Sharon Drive. However, the burden of proof which must be met to establish the existence of aggravating circumstances is not mere probability but proof beyond a reasonable doubt. We conclude that the evidence has not established beyond a reasonable doubt that the defendant created a great risk of death to more than two other persons. The sentencing panel concludes that aggravating circumstance (1)(f) is not applicable in this case.

(g) *The victim was a law enforcement officer or a public servant having custody of the offender or another* (Section 29-2523(1)(g)).

Michael Kellogg, the victim in this case, was a private citizen who, entirely of his own volition, came to the aid of law enforcement officers attempting to apprehend the suspects in the Hinky Dinky robbery; he had not been deputized by any of the officers at the scene. On that basis, the panel concludes that aggravating circumstance (1)(g) is not applicable in this case.

(h) *The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws* (Section 29-2523(1)(h)).

The defendant has moved the court for a declaration that this aggravating circumstance is unconstitutionally vague under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3, of the Nebraska Constitution. The court rejects this claim on the basis of the Nebraska Supreme Court's construction of this aggravator in its opinion disposing of the defendant's original direct appeal, *Rust, supra,* 541.

Although Michael Kellogg had not been deputized by any of the officers on the scene, and thus was not performing a "governmental function" at the time of his death, it is abundantly clear that he was shot and killed by the defendant in the defendant's all out attempt to avoid apprehension by law enforcement officers for the armed robbery of the Hinky Dinky store and for the ensuing assaults on the Omaha Police Division officers pursuing him. The defendant was clearly attempting to "disrupt or hinder . . . the enforcement of the laws." The panel determines that this aggravating circumstance is applicable beyond a reasonable doubt.

V

STATUTORY MITIGATING CIRCUMSTANCES

As to the mitigating circumstances, the statutory definitions of which are hereafter set forth, the sentencing panel unanimously finds as follows:

(a) *The offender has no significant history of prior criminal activity* (Section 29-2523(2)(a)).

In applying this mitigating circumstance, the considerations to be taken into account are quite similar to those used in applying the second clause of aggravating circumstance (1)(a) "substantial history of serious assaultive or terrorizing criminal activity". The term "significant history" refers not to a slight or inconsequential history of criminal activity but, rather, to an important, notable, or meaningful history, as the Nebraska Supreme Court held in *State v. Holtan,* 197 Neb. 544, 548, 250 N.W.2d 876, 880, *cert. denied sub nom. Rust v. Nebraska,* 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977).

As we found earlier regarding aggravating circumstance (1)(a), the defendant has a previous felony conviction for assault with intent to inflict great bodily injury. What makes this conviction particularly "important, notable, or meaningful" is that it involves the defendant's willingness to resort to violence to achieve his objectives, as was the case in the homicide for which he is now being resentenced. The sentencing panel concludes that mitigating circumstance (2)(a) is clearly not applicable in this case.

(b) *The offender acted under unusual pressures or influences or under the domination of another person* (Section 29-2523(2)(b)).

In *State v. Holtan, supra,* the Nebraska Supreme Court held that acts performed under unusual pressures or influences or under the domination of another person contemplate only outside pressures, not those created by the defendant's own acts.

The defendant presented a number of witnesses, both professional and lay, who characterized him as a "follower" rather than a leader, and, on that basis, he argues for the existence of this mitigating circumstance. We are unpersuaded. To the contrary, we believe that the defendant is an intelligent person who chose the path of an armed robber, and we therefore conclude that he is not entitled to the benefit of this mitigating circumstance.

(c) *The crime was committed while the offender was under the influence of extreme mental or emotional disturbance* (Section 29-2523(2)(c)).

Caryn S. Hacker, D.C.S.W., C.M.S.W., of Therapy Resource Associates, has conducted a psycho-social evaluation of the defendant, and Stephen M. Skulsky, Ph.D., a licensed, certified clinical psychologist, has conducted a psychological evaluation of the defendant. Ms. Hacker's evaluation, the results of which are detailed in Exhibits 118 and 119, consisted of interviews of the defendant for a total of five hours on two separate occasions in October, 1993, in preparation for this resentencing proceeding; afterward, it was she who recommended the psychological evaluation by Dr. Skulsky, which consisted of a brief,

thirty-five minute individual interview of the defendant in December, 1993, and the administration of a battery of five diagnostic tests, two of which were completed in Dr. Skulsky's presence, with the remainder being completed at the defendant's leisure and then returned to Dr. Skulsky. Dr. Skulsky's conclusions are set forth in Exhibit 135, as well as in his live testimony in this proceeding.

Both of these professionals reached essentially the same diagnostic conclusion: the defendant has a severe emotional disturbance which they denominated as an anti-social personality disorder, which is generally characterized by, among other things, dishonesty or lying, disrespect for individual boundaries of other persons, and in the defendant's case by very poor frustration tolerance. Both Ms. Hacker and Dr. Skulsky attributed the development of this personality disorder to very severe, lifelong depression and severe social anxieties arising from the defendant's physical abnormalities, a surgically repaired cleft lip, and a prosthetic eye, the result of a childhood accident, which apparently led to frequent ridicule by classmates. Additional factors were the deaths of his brother, his father and a grandparent during his youth. Defendant's father blamed the defendant for his brother, Harry's death. Defendant's father to whom the defendant was strongly attached died approximately one year later. Dr. Skulsky noted the defendant's tendency to engage, on a fairly regular basis, in behaviors that are inappropriate or anti-social, and he characterized this tendency as a personality disorder defense mechanism employed by the defendant to avoid having to deal with his underlying depression and anxiety.

As the original sentencing panel observed, the killing of Michael Kellogg took place following the defendant's participation in an armed robbery and the ensuing gun battle with pursuing law enforcement officers, at which point any normal person would have to have been under the influence of extreme mental or emotional disturbance. Dr. Skulsky's testimony confirmed this conclusion, adding that the defendant's depression and anxiety only exacerbated his reaction to what was an already stressful situation, diminishing his ability to make appropriate choices. The sentencing panel concludes that mitigating circumstance (2)(c) is applicable in this case.

4. *The age of the defendant at the time of the crime* Section 29-2523(2)(d)).

The Nebraska Supreme Court has interpreted this mitigating circumstance in *State v. Simants, supra,* 568, (1977), to refer to a child of tender age, a juvenile, or a person of advanced years, where senility might be a factor. At the time of this crime spree, the defendant was twenty-three years old, and, on that basis, this mitigator appears not to be applicable in this case. The defendant contends, however, that chronological age is not the only consideration to be taken into account, and he directs our attention to the statement in Dr. Skulsky's testimony that, in situations of extreme emotional upset, the defendant is probably like a three-year-old. Whatever the accuracy of that statement, the panel concludes that the defendant is not so immature that his unwillingness or inability to control his behavior should entitle him to the benefit of

this mitigating circumstance, and we find that it is not applicable in this case.

> 5. *The offender was an accomplice in the crime committed by another person and his participation was relatively minor* (Section 29-2523(2)(e)).

Although the defendant presented evidence, both at the 1978 postconviction proceedings and at the resentencing proceedings before the members of this panel, that it was Ronald Ell, not the defendant, who shot Michael Kellogg, he does not argue for the existence of this mitigating circumstance. For a number of reasons which we need not discuss, we find this evidence utterly unworthy of belief, and we conclude that mitigating circumstance (2)(e) is clearly not applicable in this case.

> 6. *The victim was a participant in the defendant's conduct or consented to the act* (Section 29-2523(2)(f)).

There is no evidence to support the existence of this mitigating circumstance, and the panel concludes that it is clearly not applicable in this case.

> 7. *At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication* (Section 29-2523(2)(g)).

There is no evidence that, at the time he shot Michael Kellogg, the defendant was intoxicated as a result of drug or alcohol consumption, nor do the professional evaluations of the defendant give any indication that he has a mental defect, in the sense of mental retardation or organic brain damage.

The Nebraska Supreme Court has not, so far as the members of this sentencing panel are aware, clearly defined the distinction between the "extreme mental or emotional disturbance" aspect of mitigating circumstance (2)(c) and the "capacity . . . impaired as a result of mental illness, mental defect . . . " aspect of mitigating circumstance (2)(g). As his counsel correctly points out, the defendant need not be insane or incompetent in order for this mitigator to apply. However, while we acknowledge, as does the State, the existence of the defendant's personality disorder, which we earlier discussed in connection with mitigating circumstance (2)(c), we are of the opinion that it is more appropriately evaluated as an emotional disturbance rather than as a mental illness, and we therefore conclude that mitigating circumstance (2)(g) is not applicable in this case.

VI

NON-STATUTORY MITIGATING CIRCUMSTANCES

In addition to the statutory mitigating circumstances specified in §29-2523(2), the sentencing panel is required, both by statute, Neb. Rev. Stat. §29-2521 (Reissue 1989), and by case law, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *State v. Holtan*, 205 Neb. 314,

318-319, 287 N.W.2d 671, 674, *cert. denied*, 449 U.S. 891, 101 S.Ct. 250, 66 L.Ed.2d 117 (1980), to consider any non-statutory mitigating evidence proffered by the defendant which the panel deems to have probative value as to the character of the defendant or the circumstances of the offense.

Both in his Presentencing Memorandum and at the evidentiary hearing in this matter, the defendant argued for the existence of several such non-statutory mitigating factors, including his "turbulent family history, and exceptionally unhappy and unstable childhood"; the "cognitive deficits, learning disabilities or educational deficiencies" from which he suffered; his rehabilitative efforts and "scholastic accomplishments" while incarcerated following his conviction in this case; the sentence of life imprisonment imposed on Ronald Ell, his co-defendant; his co-defendant's admission to having been the actual killer of Michael Kellogg, a claim which we have previously rejected as unworthy of belief; and the minimal likelihood of his engaging in future acts of violence, a claim which the mental health professionals who evaluated him specifically limited to the circumstance of his continued incarceration, in which the defendant would be subject to a rigid system of external controls on his behavior. We have carefully considered the non-statutory mitigating factors which the defendant argues are applicable, but, without discussing them in detail, we conclude that they are entitled to little, if any, weight.

VII

DETERMINATION OF SENTENCE

In determining the sentence to be imposed on the defendant, the sentencing panel is required by Neb. Rev. Stat. §29-2522 (Reissue 1989) to consider (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Nebraska Supreme Court has repeatedly emphasized that the determination or sentence is to be based not on a mere numerical counting of aggravating and mitigating circumstances but, rather, requires a careful weighing and examination of the various factors. The sentencing panel has undertaken that careful weighing and examination.

We have previously determined that aggravating circumstance (1)(h) ("The crime was committed to disrupt or hinder . . . the enforcement of the laws") and the first prong of aggravating circumstance (1)(a) ("The offender was previously convicted of . . . a crime involving the use or threat of violence to the person . . . ") are applicable in this case beyond a reasonable doubt. However, aggravator (1)(a) is entitled to less weight in this case than had John Rust's record of violent crime approached that of the defendant in *State v. Holtan, supra,* 546 (previous convictions for armed robbery and first-degree assault, as well as three convictions for bank robbery), or the defendant in *State v. Peery,* 199 Neb. 656, 671-673, 261 N.W.2d 95,

103-104 (1977), *cert. denied,* 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Peery's previous convictions included felony escape involving forcible detainer and robbery of a jailer; no fewer than five armed robberies, one of which also involved rape of a pregnant woman in her home; and assault of a courthouse librarian in an attempted escape. The panel concludes that the weight of the existing aggravating circumstances (1)(a) and (1)(h) is not sufficient to justify imposition of a death sentence. In addition, the weight we accord to mitigating circumstance (2)(c) approaches the weight we give to the existing aggravating circumstances. On that basis, we conclude that a sentence of death would not be appropriate in this case, and therefore, we do not consider whether such a sentence would have been excessive if it had been imposed.

We are acutely aware that our conclusion as to the appropriate sentence differs from that of the original sentencing panel, which determined that a sentence of death was warranted. Our decision to the contrary is in no way intended, nor should it be interpreted, to impugn the efforts and integrity of the original panel, which had to reach its conclusion without the benefit of the significant appellate guidance from the Nebraska Supreme Court with which we have been favored in the intervening years. Nor is our decision in any way intended to minimize the tragic loss suffered by the family of Michael Kellogg, whose life was extinguished by the defendant's resort to violence. Finally, our determination that the defendant should be sentenced to imprisonment for life is coupled with the fervent desire that he never be released from custody, for we share the opinion of the experts who examined him that, absent the external controls imposed

by incarceration, the defendant would be likely again to resort to acts of violence.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant, John Edward Rust, be, and by this Order he is, sentenced to imprisonment in an institution under the jurisdiction of the Nebraska Department of Correctional Services for the remainder of his natural life, for the crime of Murder in the First Degree during the perpetration of or attempt to perpetrate a robbery, as charged in Count I of the Information.

IT IS FURTHER ORDERED that, pursuant to *State v. Jones*, 218 Neb. 713, (1984), the sentence on Count I be served consecutively to the sentences previously imposed on Counts II, III, and IV of the Information in this case.

IT IS FURTHER ORDERED that a signed or certified copy of this judgment and sentence shall be delivered to the Sheriff of Douglas County, Nebraska, who shall keep the defendant, John Edward Rust, in his custody and promptly deliver him to the Director of the Nebraska Department of Correctional Services.

IT IS FURTHER ORDERED that a certified copy of this judgment and sentence serve as the commitment of the defendant.

Dated at Omaha, Douglas County, Nebraska, this 25th day of March, 1994.

BY THE COURT:

/s/ J. Patrick Mullen
J. Patrick Mullen
District Judge

/s/ Ronald E. Reagan
Ronald E. Reagan
District Judge

/s/ Stephen R. Illingworth
Stephen R. Illingworth
District Judge